

SEPARATION OF POWERS

Law Day Speech by Judge Carolyn B. McHugh, Utah Court of Appeals

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When I was invited to speak to you about Separation of Powers, I enthusiastically accepted because of my conviction that this doctrine is the cornerstone of the United States' Constitution. Indeed, I believe that the understanding of and respect for the doctrine of separation of powers is what has made our system of government successful for the past 200 years and what will see it through the next centuries.

The doctrine of separation of powers is simply the idea that government functions best when its powers are not concentrated in a single authority. It is premised on the conviction that all people, and institutions run by people, are potentially corrupt. As cynical as this proposition may be, it is the acceptance of it as a tenant of the human condition that forms the justification for a government, like ours, which is designed to prevent the accumulation of power in a single branch or person.

President Abraham Lincoln recognized the temptation for even good men to be negatively affected by too much power when he said: "Nearly all men can stand adversity, but if you want to test a man's character, give him power."¹ The premise of the Constitution is to never put anyone to that test. Instead, power in this country is intentionally separated among three distinct branches of government.

The idea that governmental power should not be concentrated was introduced as early as Aristotle's time and was discussed and promoted as a governmental model prior to the time our Constitution was written.

Despite the intellectual acceptance of separation of powers, no existing nation was free to form a government completely from scratch until the United States broke from Great Britain. As Margaret Thatcher, the former British prime minister, noted: "Europe was created by history. America was created by philosophy."²

The framers of our Constitution did not want a king and likewise did not want a person holding an elected or appointed office who could manipulate the powers of the government so as to become a de facto king. To prevent this, they wrote separation of powers into the structure of the United States Constitution of 1789.

1. Michael Moncur, MICHAEL MONCUR'S (CYNICAL) QUOTATIONS, *at* <http://www.quotationspage.com/quote/414.html> (last visited May 3, 2006).

2. Michael Moncur, CLASSIC QUOTES, *at* <http://www.quotationspage.com/quote/32966.html> (last visited May 3, 2006).

Indeed, the United States is the first nation³ to incorporate the doctrine of separation of powers into its written constitution and today serves as a model for the constitutions of other emerging democracies. In fact, the United Nations has advocated both separation of powers and the need for an independent judicial branch as the best defense against reverting to a dictatorship.⁴

Interestingly, the United States Constitution never uses the phrase “separation of power.” Instead, it implements the doctrine by the creation of three separate branches of government in the first three articles of the Constitution.⁵ Each of these branches is given discrete authority to perform certain functions and each is also provided with built-in mechanisms, usually referred to as checks and balances, for preventing the other two branches from encroaching on that authority or overstepping its own.

After the Constitution was drafted, it had to be approved by the states. The Federalist Papers are essays written by James Madison, John Jay, and Alexander Hamilton encouraging the ratification of the U.S. Constitution. Referring to the need for these checks and balances, Federalist Paper No. 51 explained that:

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.⁶

Imagine if you will, building a house of cards. Three cards placed at precisely the correct angle and position to stand together. If one is moved too upright or another tilted too far down, the whole house will fall. But, if placed carefully and maintained exactly, the house will stand. That is how separation of powers works. The three cards are: the Legislature; the Executive; and the Courts.

3. James Madison, however, was instrumental in incorporating the doctrine of separation of powers into the written constitution of the State of Massachusetts in 1780. *See* MASS. CONST. pt. II, chs. 1-3. Much of the format for the nation's constitution was borrowed from the structure already adopted by Massachusetts.

4. *See* F.B. William Kelly, *An Independent Judiciary: The Core of the Rule of Law*, at http://www.icclr.law.ubc.ca/Publications/Reports/An_Independant_Judiciary.pdf (last visited May 10, 2006).

5. U.S. CONST. art. I-III.

6. THE FEDERALIST NO. 51 (Alexander Hamilton or James Madison).

The Legislative Branch

Article I of the Constitution creates Congress and grants to it the power to make laws. The greatest power held by Congress is control of the national budget. Congress alone has the power to raise taxes, borrow money, and authorize the expenditure of federal funds.⁷

There are checks and balances on Congressional power. The Executive can exercise the Presidential veto and refuse to sign legislation into law.⁸ In addition, the Judicial branch can check Congress' power by exercising judicial review of legislation. If the courts determine that a law passed by Congress and signed by the President is in conflict with the Constitution, the courts must declare the law unconstitutional and of no effect.⁹

The Executive Branch

Article II of the Constitution creates the Executive branch, which is headed by the President.¹⁰ The President's powers include the power to enforce the laws passed by Congress, to make treaties with other nations, to nominate judges, to appoint officers of the government, and to oversee federal agencies.¹¹

The checks on Presidential power are held by the courts and Congress. Congress has the right to remove the President from office if he is guilty of "bribery, treason, or other high crimes or misdemeanors."¹² Congress also has the right to reject any treaty negotiated by the President and it can refuse to confirm the appointments made by the President to the judiciary and other government offices.¹³

7. U.S. CONST. art. I.

8. U.S. CONST. art. I, § 7.

9. *See Marbury v. Madison*, 5 U.S. 137, 178-80 (1803) (holding that courts have the duty to declare laws invalid if they are in opposition to the constitution).

10. U.S. CONST. art. II, § 1.

11. U.S. CONST. art. II, § 2.

12. U.S. Const. art. II, § 4.

13. U.S. CONST. art. II, § 2.

The judiciary's ability to check the actions of the President is again through judicial review. If the court determines that an executive action is unconstitutional, it must declare it invalid.¹⁴

The Judicial Branch

Article III of the Constitution vests the judicial power of the United States in the Supreme Court and such other inferior federal courts as established by Congress.¹⁵ The power of the judiciary includes the power to hear all cases and controversies arising under the Constitution, international treaties, or federal statutes, as well as disputes between the States.¹⁶

The checks on judicial power are held by the other branches. Congress has the power to impeach and try federal judges for misconduct in office.¹⁷ Furthermore, no person can serve as a federal judge without being confirmed by the Senate.¹⁸

The President has the exclusive right to appoint persons to vacancies on the federal courts.¹⁹

An additional check on judicial power is that the courts can only decide cases and controversies. That means, they can only weigh in on an issue if it is brought to the court by a person or entity that is actually affected by the law or action challenged.²⁰

Balance Among the Branches

The framers of the Constitution thought it not only essential to create separate branches, but also imperative that each be equally powerful. The reason for this was that each branch would be required to preserve its own power by defeating attempts by the other branches to

14. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (striking down executive action to seize control of steel mills during the Korean War).

15. U.S. CONST. art. III, § 1.

16. U.S. CONST. art. II, § 2.

17. U.S. CONST. art. II, § 1.

18. U.S. CONST. art. II, § 2.

19. U.S. CONST. art. II, § 2.

20. See *Liner v. Jafco, Inc.*, 375 U.S. 301, 306 n.3 (1964) (holding that court may not entertain action after it has become moot).

expand their own.

While the President, as commander in chief of the armed forces, holds the sword, and Congress, as the only entity that can authorize federal expenditures, holds the purse, the judiciary had control over neither. The framers of the Constitution therefore had to design some power that would allow the courts to perform their oversight responsibility and maintain their position in this tri-party system of government.

The solution they arrived at was to make the courts free to issue fair and impartial decisions without fear of retribution from the President or Congress. Under our Constitution, federal judges are appointed for life during good behavior and their salaries cannot be diminished.²¹

The belief that courts should be free from undue influence was part of the justification for the American Revolution. The Declaration of Independence starts with a long list of grievances against King George. One of the unacceptable conditions of British rule prominently listed was that the King made judges "dependent upon his will alone, for the tenure of their offices and the amount of their salaries."²² Our forefathers knew from personal experience that the courts could not remain impartial if they were subject to dismissal or a cut in pay for unpopular decisions.

Perhaps you wonder why the fathers of our country wanted the courts to be free to render unpopular decisions. This is particularly puzzling in a democracy, where the expectation is that the majority rules. To understand the role of the courts, it is essential to recognize the premise upon which our Constitution was based.

Surprisingly, the United States is not a pure democracy. By that I mean, the majority does not always get to decide an issue. Rather, the United States was based on the acknowledgment that there are certain rights that each human being possesses inherently. These human or civil rights were never ceded by the people to their government. Government was formed to protect and enhance those rights, but could not curtail them.

As part of the ratification process, a number of these individual rights were expressly set forth in the first ten amendments to the Constitution. These amendments, referred to as the Bill of Rights, enumerate limitations on the power of government to intrude upon certain individual liberties.

The guardians of these individual rights are the courts. The judicial branch is required to uphold the constitution in the face of inconsistent legislation or executive action, even if a

21. U.S. CONST. art. III, § 1.

22. THE DECLARATION OF INDEPENDENCE, para. 11 (U.S. 1776).

majority of the country supports it. In that way, the courts stand as the last defense of each individual's rights.

Justice Antonin Scalia of the United States Supreme Court recognized that, stating "without a secure structure of separate powers, our Bill of Rights would be worthless."²³

Perhaps the best description of the role of the courts can be found in one of my favorite novels, *To Kill a Mockingbird* by Harper Lee. In that book, Atticus Finch makes an impassioned argument to the jury in a trial in which a black man in the deep south before the civil rights movement has been charged with a crime punishable by death. He states:

But there is one way in this country in which all men are created equal—there is one human institution that makes a pauper the equal of a Rockefeller, the stupid man the equal of an Einstein, and the ignorant man the equal of any college president. That institution, gentlemen, is a court. It can be the Supreme Court of the United States or the humblest J.P. court in the land, or this honorable court which you serve. Our courts have their faults, as does any human institution, but in this country our courts are the great levelers, and in our courts all men are created equal.²⁴

That ladies and gentlemen is the role of the courts in our system of government.

Although the legislative and executive branches were designed to be responsive to the wishes of the majority, the courts were to answer only to the constitution itself and to do so completely unaffected by outside influence.

The Natural Tension Among the Branches

By dispersing pockets of power among three separate branches of government, the framers created an intentional and natural tension among those branches. Few leaders like to share power. Consequently, it is not at all unusual to hear one branch issue bitter and public criticism of another branch.

Theodore Roosevelt appointed Oliver Wendell Holmes to the United States Supreme Court, thinking that Justice Holmes would see issues much like the President himself. Once on the Court, Justice Holmes voted on several cases in a way that disappointed the President. Not

23. *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

24. Harper Lee, *To Kill A Mocking Bird* 205 (Warner Books 1982) (1960).

one to mince words when unhappy, President Roosevelt publically announced that he "could carve a judge with more backbone out of a banana."²⁵

This type of conflict was intended by the fathers of our country and, when tempered by ultimate submission to the separate powers paradigm, is a sign that the system is operating correctly.

At times, however, the rhetoric is disturbing not only for its vehemence but also for its disrespect for the system itself. When a judge issued orders to enforce the Supreme Court's school desegregation order, Alabama's Governor, George Wallace, publically described the judge as an "integrating, scalawaggin, carpetbagging liar."²⁶

Few today would agree with racial segregation or with Governor Wallace's comments, but at the time he had overwhelming public support and the judge's personal safety was at risk.²⁷

Furthermore, removing the judge from office or subjecting him or her to threats of violence is not the method provided by the Constitution for addressing unpopular decisions. If Congress does not agree with the Supreme Court's interpretation of the Constitution, Congress can act to amend the Constitution. Our forefathers intended this to be a difficult process and it requires the vote of two-thirds of both houses of Congress and the approval of three-fourths of the States.²⁸

If the legislature believes that the court has misinterpreted a statute or misapplied common law principles, they need only pass legislation that makes their intention on the matter clear.

25. Todd S. Purdum, *Presidents, Picking Justices, Can Have Backfires*, N.Y. TIMES, July 5, 2005, available at <http://www.nytimes.com/2005/07/05/politics/politicsspecial1/05history.html?ex=1278216000&en=275e7437bd70309d&ei=5090&partner=rssuserland&emc=rss>.

26. *Biography of Frank M. Johnson, Jr., Unrelenting Devotion to the Rule of Law*, ACADEMY OF ACHIEVEMENT, at <http://www.achievement.org/autodoc/page/joh2gio-1> (last visited May 10, 2006).

27. In fact, the judge in question, Judge Frank M. Johnson, Jr., had to be given police protection because his mother's house was bombed and a cross was burned on his lawn. *Id.*

28. U.S. CONST. art. V.

Of course, attacks are not limited to the judiciary. Will Rogers, a political commentator writing in the 1920s and 30s, stated: "This country has come to feel the same when Congress is in session as when the baby gets hold of a hammer."²⁹

And, one cannot turn on the TV or read the paper without seeing extremely unflattering cartoons and commentary aimed at the President.

What these comments show is threefold: First, there will always be conflicts among the various branches of government. Second, we have the privilege of living in a country where political debate and disagreement is tolerated and protected. And third, if we preserve the doctrine of separation of powers, our descendants will enjoy the same liberties.

If, on the other hand, we tamper with this amazing gift from our forefathers and upset the delicate balance they created, we risk losing what makes us unique and, in my view, the greatest system of government ever created. The balance is precarious and each of us has a responsibility to keep those cards perfectly aligned so that our house does not fall.

Now, following the advice of Franklin D. Roosevelt on effective speech making, I'll: "be sincere; be brief; [and] be seated."³⁰

Thank you for your attention.

29. *Quotations by Subject*, THE QUOTATIONS PAGE, at <http://www.quotationspage.com/subjects/Congress/>.

30. Laura Moncur, LAURA MONCUR'S MOTIVATIONAL QUOTATIONS, at <http://www.quotationspage.com/quote/2847.html> (last visited May 10, 2006).